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No. 01-1762

Supreme Court, U.S.
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In The

Supreme Court of the United States

HAROLD DAWAVENDEWA,

Petitioner,

vs.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. Essential Facts	1
B. Proceedings Below	2
1. District Court	2
2. Court of Appeals	4
REASONS WHY THE PETITION SHOULD BE DENIED	5
I. THE NINTH CIRCUIT'S OPINION IS FULLY CONSISTENT WITH THE DECISIONS OF THIS AND OTHER FEDERAL COURTS	5
II. THE NINTH CIRCUIT'S DECISION HAS ONLY LIMITED APPLICATION BEYOND THIS CASE	8
III. THE NINTH CIRCUIT DECISION IS CORRECT	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Arizona Public Service Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995) 6, 7

Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S. Ct. 289 (1985) 10

Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir.), *modified*, 257 F.3d 1158 (10th Cir. 2001) 6

Clinton v. Babbitt, 180 F.3d 1081 (9th Cir. 1999) 6

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000) 2

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) 11

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 543 (1963) 11

Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2nd Cir.), *cert. denied*, 502 U.S. 818 (1991) 5

Kescoli v. Babbitt, 101 F.3d 1304 (9th Cir. 1996) 6

Keweenaw Bay Indian Community v. State, 11 F.3d 1341 (6th Cir. 1993) 5

Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S. Ct. 1700 (1998) 10

Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page

Manybeads v. United States, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001) 6

Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245 (1981) 10

Pembina Treaty Committee v. Lujan, 980 F.2d 543 (8th Cir. 1992) 5

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900 (1984) 7

Pit River Home and Agricultural Cooperative Ass'n v. United States, 30 F.3d 1088 (9th Cir. 1994) 6

United States v. Tribal Development Corp., 100 F.3d 476 (7th Cir. 1996) 5, 9

STATUTES

42 U.S.C. § 2000e-2(a) 2, 8

42 U.S.C. § 2000e-2(i) 2, 8

Rule 19, Fed. R. Civ. P. ..... *passim*

STATEMENT OF THE CASE

A. Essential Facts

Respondent, the Salt River Project Agricultural Improvement and Power District ("SRP"), is a municipal corporation and political subdivision of the State of Arizona. It operates an electric generation facility known as the Navajo Generating Station ("NGS"), which is located on tribal land within the boundaries of the Navajo Indian reservation.

NGS was built pursuant to a lease SRP negotiated with the Navajo Nation in 1969. The lease expressly requires SRP to give employment preferences at NGS to members of the Navajo Nation:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

(Pet. App. at 3, n.2).

Petitioner is a Hopi Indian who resides a few miles away from the Navajo reservation. In 1991, he applied for one of seven Operator Trainee positions at NGS. He ranked ninth out of twenty applicants on a qualifications test. SRP chose not to interview Petitioner for the Operator Trainee positions because he is not affiliated with the Navajo Nation.

B. Proceedings Below.

1. District Court.

Petitioner filed suit against SRP alleging that giving employment preferences to Navajos, as required by SRP's lease with the Navajo Nation, violated the prohibition against national origin discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). SRP filed a motion to dismiss Petitioner's complaint, contending: (1) employment preferences given to Navajos under the lease requirement are made exempt from Title VII's prohibitions by 42 U.S.C. § 2000e-2(i) (exempting certain employment preferences "given to any individual because he is an Indian living on or near a reservation"); and (2) distinctions between Navajo and non-Navajo Indians are political distinctions outside the purview of a national origin claim.

The district court granted SRP's motion to dismiss, but the Ninth Circuit Court of Appeals reversed. *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 154 F.3d 1117 (9th Cir. 1998) ("*Dawavendewa I*"), *cert. denied*, 528 U.S. 1098 (2000). On remand, SRP again moved to dismiss, this time on the ground that the Navajo Nation is an indispensable party under Rule 19, Fed. R. Civ. P.

The district court granted SRP's motion to dismiss. It concluded the Navajo Nation was a "necessary" party under all three tests stated in Rule 19(a):[1] (1) "complete

[1] A person . . . shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action

(Continued on following page)

relief would be impossible for [Petitioner] if the Navajo Nation is not joined," (Pet. App. at 29 (relying on Rule 19(a)(1)); (2) "[t]he Navajo Nation clearly claims an interest [and] . . . [a]bsence from this litigation will 'impair or impede' the Navajo Nation" from protecting its interest, (Pet. App. at 30-31 (relying on Rule 19(a)(2)(i)); and (3) "this litigation threatens SRP with an obligation under Title VII . . . and a conflicting obligation under its lease with the Navajo Nation," (Pet. App. at 31 (relying on Rule 19(a)(2)(ii)).

The district court then concluded the Navajo Nation could not be joined because of its sovereign immunity from suit. (Pet. App. at 32-33). It then determined that the first three factors listed in Rule 19(b)[2] weigh in favor of dismissing Petitioner's suit due to the Navajo Nation's absence. With respect to the fourth factor, the district court suggested Petitioner might be able to "challenge

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in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

[2] If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

SRP's actions in Navajo Tribal Court," in which the Navajo Nation could be made a party. However, it also held that even if Petitioner had no other adequate remedy, "the Navajo Nation could still be treated as indispensable." (Pet. App. at 35-36).

2. Court of Appeals.

Petitioner appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. Like the district court, the Ninth Circuit held that the Navajo Nation was a "necessary party" under Rule 19(a) because, in the absence of the Navajo Nation, complete relief cannot be accorded to Petitioner, Petitioner's suit might impair or impede the Navajo Nation's ability to protect its obvious interest in its contractual rights under its lease with SRP, and there is a substantial risk that SRP will face inconsistent obligations. (Pet. App. at 8-15).

The Ninth Circuit also agreed that, because the Navajo Nation enjoys sovereign immunity from suit, it cannot be joined to Petitioner's suit. Moreover, it held that Petitioner could not evade the Navajo Nation's sovereign immunity by joining unspecified tribal officials in the Navajo Nation's stead. (Pet. App. at 15-20).

Finally, the Ninth Circuit weighed the required factors in Rule 19(b) and agreed with the district court that "in 'equity and good conscience' this action should not proceed in [the Navajo Nation's] absence." (Pet. App. at 20-24).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has abandoned any argument that the Navajo Nation is not a necessary party under Rule 19(a). Instead, the focus of his Petition is whether the Navajo Nation enjoys sovereign immunity at all, whether that immunity can be avoided by naming tribal officials as defendants instead of the tribe, and whether "in equity and good conscience the action should proceed" in the absence of the Navajo Nation. The Petition should be denied because: (1) the Ninth Circuit's decision joins a long list of other federal court decisions which uniformly reject Petitioner's arguments; (2) the decision has only limited application beyond this case; and (3) the Ninth Circuit decision is correct.

I. THE NINTH CIRCUIT'S OPINION IS FULLY CONSISTENT WITH THE DECISIONS OF THIS AND OTHER FEDERAL COURTS.

Although Petitioner argues that the Ninth Circuit's decision "conflicts with legal precedent" (*see* Petition at 11), he does not point to a single conflict with this Court's decisions. Nor does he contend that the Ninth Circuit's holding conflicts with the decisions of any other circuit of the Court of Appeals. To the contrary, the other circuits have consistently held that, because an absent Indian tribe enjoys sovereign immunity, the tribe is an indispensable party and dismissed the action. *See, e.g., Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2nd Cir.), *cert. denied*, 502 U.S. 818 (1991); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993); *United States v. Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996); *Pembina Treaty Committee v. Lujan*, 980

F.2d 543 (8th Cir. 1992); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993 (10th Cir.), *modified*, 257 F.3d 1158 (10th Cir. 2001).

Furthermore, the Ninth Circuit's decision in this case is consistent with many prior Ninth Circuit decisions in which suits were dismissed because tribal sovereign immunity prevented the joinder of an absent Indian tribe – even when dismissal admittedly left the plaintiffs without any adequate remedy. *See, e.g., Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Pit River Home and Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994).

Petitioner nevertheless asserts that the Ninth Circuit's decision conflicts with its prior ruling in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). However, there is, in fact, no conflict at all. In *Aspaas*, the Office of Navajo Labor Relations initiated administrative proceedings challenging the application of APS's anti-nepotism policy to Navajo employees at the power plant operated by APS on the Navajo reservation. After the administrative agency ruled against it, APS appealed to the Navajo Supreme Court. That court affirmed the ruling against APS, and APS filed suit in federal district court against the tribe, various tribal agencies and tribal officials, seeking declaratory and injunctive relief. The district court dismissed APS' claims against the Navajo Nation and its agencies based on sovereign immunity, but allowed APS to proceed with its claim that the tribal officials violated federal law by acting beyond the scope of their authority. The Ninth Circuit affirmed.

Aspaas is inapplicable for several reasons. First, Petitioner has never asserted in this case a claim that any tribal official has violated federal law by acting beyond the scope of his or her authority. Indeed, Petitioner has not alleged any conduct of any kind by tribal officials. Furthermore, he has neither named any tribal officials as parties to this action, nor filed a motion to amend his complaint for that purpose.

More importantly, whether the Navajo Nation was an indispensable party under Rule 19 was not an issue in *Aspaas*. Thus, *Aspaas* does not support the proposition for which Petitioner cites it: if the Navajo Nation cannot be joined because of its sovereign immunity, Petitioner's suit should nevertheless proceed with individual tribal officials standing in the Navajo Nation's place. To the contrary, this Court has held:

> The general rule is that relief sought nominally against an officer is in fact against the sovereign **if the decree would operate against the latter.** And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-02, 104 S. Ct. 900, 908-09 (1984) (emphasis added). Thus, if a suit against tribal officials would result in a judgment binding on the tribe, it too is barred by sovereign immunity. On the other hand, if a suit against tribal officials does not bind the tribe, the suit may not be barred, but it does not solve Petitioner's indispensable party problem precisely because it does not bind the tribe.

Accordingly, because the Ninth Circuit's decision is consistent with a well-established body of cases throughout the federal courts, this Court should deny the Petition for Writ of Certiorari.

II. THE NINTH CIRCUIT'S DECISION HAS ONLY LIMITED APPLICATION BEYOND THIS CASE.

The Petition should also be denied because the Ninth Circuit's decision has only limited application beyond this case. Petitioner's arguments to the contrary are unfounded.

Petitioner substantially overstates when he claims that, as a result of the Ninth Circuit decision, "Title VII will no longer apply on Tribal lands." (Petition at 6). This doomsday prediction is unsupported by any evidence or logic. Central to the determination in this case that the Navajo Nation is an indispensable party was the lease provision requiring SRP to give employment preferences to Navajos. Not every tribe mandates employment preferences through lease provisions (or tribal ordinances), and many that do require only "Indian preference" – which Title VII expressly allows (42 U.S.C. § 2000e-2(i)) – and do not involve preferences based on tribal affiliation.

Moreover, Petitioner's dire prediction also ignores the broad scope of Title VII. Beyond tribal-affiliation preferences, Title VII prohibits discrimination based on race, color, religion and sex. 42 U.S.C. § 2000e-2(a). Petitioner offers no evidence that any tribe mandates such discrimination through their leases or ordinances, nor is there any suggestion that any tribe claims an interest in doing so. Accordingly, tribes will not be necessary parties (let alone

indispensable) in these kinds of Title VII suits that might arise on their reservation.

Finally, contrary to Petitioner's claims, the Ninth Circuit's decision does not necessarily make Title VII inapplicable to other cases of tribal-affiliation preferences on the Navajo or other reservations. As the Seventh Circuit correctly noted, "Rule 19, which refers a court to its sense of 'equity and good conscience,' mandates a case-specific inquiry." *United States v. Tribal Development Corp.*, 100 F.3d 476, 481 (7th Cir. 1996). In *Tribal Development Corp.*, the court upheld the conclusion that the Menominee Indian Tribe was an indispensable party to a *qui tam* action challenging the legality of certain agreements to sell or lease gambling equipment to the tribe. Because of Rule 19's case-specific inquiry, the court rejected the plaintiffs' argument that concluding the tribe is an indispensable party in one case would "effectively nullify the *qui tam* provisions." It stated:

> Our decision in this case does not eliminate the possibility that in a *qui tam* action involving different circumstances, a sovereign tribe might not be indispensable under Rule 19.

Id. For these same reasons, Petitioner's hyperbolic claim of the total demise of Title VII on Indian reservations is unpersuasive.

III. THE NINTH CIRCUIT DECISION IS CORRECT.

Finally, the Petition for review should be denied because the Ninth Circuit's decision is correct. Petitioner erroneously argues the Navajo Nation cannot claim sovereign immunity in this case because neither Petitioner

nor SRP are members of the Navajo Nation. (Petition at 14). Petitioner's argument confuses two very distinct concepts: tribal sovereign authority and tribal sovereign immunity. A tribe's sovereign authority relates to the tribe's right to exercise authority over others. By contrast, a tribe's sovereign immunity addresses its ability to avoid suit in the courts of other sovereigns.

Tribal sovereign authority generally does not extend beyond the boundaries of the reservation or to nonmembers of the tribe. *See Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258 (1981). By contrast, tribal sovereign immunity does not depend on whether the challenged activity occurs on or off the reservation or whether the parties to the suit are nonmembers of the tribe. *See Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 1705 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir.) ("[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation."), *rev'd in part on other grounds*, 474 U.S. 9, 106 S. Ct. 289 (1985). The Ninth Circuit recognized Petitioner's mistaken effort to jumble these two distinct concepts and properly rejected it. (Pet. App. at 20 ("Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity.")).

Petitioner also erroneously asserts that, because Title VII is a law of general application, it must apply on the Navajo Nation's reservation, irrespective of treaty or other

rights. (Petition at 9-10 (citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543 (1963); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683 (9th Cir. 1991); and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)). However, as the Ninth Circuit correctly pointed out, the very cases on which Petitioner relies "also outline specific exceptions to the general rule – situations in which statutes of general applicability do not apply to Native Americans on tribal lands. In appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance." (Pet. App. at 14 (citations omitted)). Because the Ninth Circuit employed the correct analysis and reached the correct conclusion, review of the Ninth Circuit decision is not warranted.

CONCLUSION

For the reasons discussed above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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